

**Frank V. Carlow and Michael Carlow, d/b/a Carlow's Ltd. and Service Employees International Union, Local 585, AFL-CIO.** Cases 6-CA-15135, 6-CA-17735, and 6-CA-18008

September 29, 1994

# SUPPLEMENTAL DECISION AND ORDER

BY MEMBERS STEPHENS, DEVANEY, AND COHEN

On March 4, 1983, the National Labor Relations Board issued a Decision and Order,<sup>1</sup> directing Frank V. Carlow and Michael Carlow, d/b/a Carlow's Ltd. (the Respondent), inter alia, to bargain, upon request, with the Service Employees International Union, Local 585, AFL-CIO (the Union). The United States Court of Appeals for the Third Circuit enforced the Board's Order in its entirety on June 15, 1984.<sup>2</sup> The Union subsequently filed charges in Case 6-CA-17735 alleging a refusal to bargain in good faith and in Case 6-CA-18008 alleging a refusal to provide information. The General Counsel sought and obtained Board authorization to initiate contempt proceedings against the Respondent in Cases 6-CA-15135, 6-CA-17735, and 6-CA-18008. On July 18, 1988, the United States Court of Appeals for the Third Circuit found the Respondent in civil contempt.<sup>3</sup> The Third Circuit ordered the Respondent, inter alia, to comply fully with and obey the June 1984 order; to cease and desist from failing to make available to the Union all relevant information; to cease and desist from failing to make pension contributions as provided for in the parties' expired collective-bargaining agreement and from altering in any other manner the employees' terms and conditions of employment set forth in the previous agreement or otherwise making unilateral changes in employees' terms and conditions of employment unless and until it first bargains with the Union and reaches agreement or bona fide impasse. The court also ordered the Respondent to pay all pension contributions owing since the court's judgment and that "The amounts owing, if not agreed upon between the parties, shall be fixed in a proceeding before the Board." A controversy having arisen over the amount of backpay due under the terms of the Board's and the Third Circuit Court of Appeals' Orders, the Acting Regional Director for Region 6 issued a backpay specification and notice of hearing on April 7, 1993. The Respondent filed an answer admitting in part and denying in part the allegations in the backpay specification.

On May 19, 1993, the General Counsel filed a Motion to Strike Portions of the Respondent's Answer to the Backpay Specification and Deem Admitted Por-

tions of the Backpay Specification and for Partial Summary Judgment. On May 24, 1993, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. On June 30, 1993, the Respondent filed an answer admitting in part and denying in part the allegations of the backpay specification and the Motion for Summary Judgment.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

On the entire record in this case, the Board makes the following

## Ruling on Motion for Summary Judgment

In the backpay specification,<sup>4</sup> the General Counsel alleges that the Respondent and the Union were parties to a collective-bargaining agreement effective by its terms from January 1, 1979, to December 31, 1981. Upon expiration of this agreement, the Respondent was obligated to continue in full force and effect the terms and conditions of employment set forth in that agreement until July 18, 1988, when compliance with the terms of the expired contract was achieved by the Respondent. That agreement contained provisions entitling employees to sick leave, holiday pay, vacation pay, wage differential, bereavement pay, and hospitalization. The General Counsel alleges that certain named employees are entitled to, but did not receive, amounts set forth in the backpay specification for sick leave, holiday pay, vacation pay, wage differential, bereavement, and hospitalization, and alleges that these employees are entitled to the amounts of gross backpay as set forth in the backpay specification.

The Respondent, in its answer to the backpay specification, argues that it has no responsibilities under the expired collective-bargaining agreement. In the event the contract is still valid, the Respondent argues that laches applies because the matter has been in litigation for more than 12 years. The Respondent also maintains in its answer to the backpay specification that employee Raymond Smitley was part of "management"; employee Samuel Gulino did not want hospitalization; employee Robert Risha was a part-time employee and therefore not entitled to sick leave; that no sick leave benefits should have to be paid because no employee ever requested to be paid benefits, as required under the contract; and that no claims for unpaid hospitalization are due because no evidence was introduced that any of the named employees sustained any expenses.

In his Motion to Strike Portions of the Respondent's Answer to the Backpay Specification and Deem Ad-

<sup>1</sup> 266 NLRB 305.

<sup>2</sup> *NLRB v. Carlow, et al., d/b/a Carlow's Ltd.*, Case 83-3371.

<sup>3</sup> *NLRB v. Frank V. Carlow and Michael Carlow, d/b/a Carlow's Ltd.*, Case 86-3711.

<sup>4</sup> We grant the General Counsel's October 14, 1993 motion to amend the backpay specification and remove from consideration Cases 6-CA-21701, 6-CA-21754, and 6-CA-21771 which were inadvertently included in the specification.

mitted Portions of Backpay Specification and for Partial Summary Judgment, the General Counsel argues that the Respondent's answer is not adequate under Section 102.56(b) and (c) of the Board's Rules and Regulations which provide, *inter alia*,

(b) *Contents of answer to specification.*—The answer shall specifically admit, deny, or explain each and every allegation of the specification, unless the respondent is without knowledge, in which case the respondent shall so state, such statement operating as a denial. Denials shall fairly meet the substance of the allegations of the specification at issue. When a respondent intends to deny only a part of an allegation, the respondent shall specify so much of it as is true and shall deny only the remainder. As to all matters within the knowledge of respondent, including but not limited to the various factors entering into the computation of gross backpay, a general denial shall not suffice. As to such matters, if the respondent disputes either the accuracy of the figures in the specification or the premises on which they are based, the answer shall specifically state the basis for such a disagreement, setting forth in detail the respondent's position as to the applicable premises and furnishing the appropriate supporting figures.

(c) *Effect of failure to answer or to plead specifically and in detail to backpay allegations of specification.* . . . If the respondent files an answer to the specification but fails to deny any allegation of the specification in the manner required by paragraph (b) of this section, and the failure so to deny is not adequately explained, such allegation shall be deemed to be admitted to be true, and may be so found by the Board without the taking of evidence supporting such allegation, and the respondent shall be precluded from introducing any evidence controverting the allegation.

The General Counsel also contends that the Respondent, by arguing that it has no responsibilities under the expired collective-bargaining agreement, is seeking to relitigate matters previously determined in the underlying unfair labor practice proceeding as enforced by the United States Court of Appeals for the Third Circuit in both its June 15, 1984 judgment and memorandum opinion and in the adjudication in civil contempt issued on July 18, 1988. Thus, the General Counsel maintains that the issue is *res judicata* and must be deemed admitted.

Regarding the amounts owed in the areas of sick leave, holiday pay, vacation pay, wage differential, bereavement pay, and hospitalization, the General Counsel contends that a general denial is insufficient under Section 102.56 of the Rules because it does not spe-

cifically state the basis of its denial or set forth the applicable premises and furnish appropriate supporting figures. The General Counsel also alleges that the Respondent's general denial of the remainder of the allegations is likewise inadequate to satisfy the pleading requirements set forth in Section 102.56 of the Rules. The General Counsel also contends that the Respondent's defense regarding discriminatee Raymond Smitley, namely, that he "was considered in management," is insufficient because the answer does not allege that Smitley was a statutory supervisor under Section 2(11) of the Act or that Smitley was not in the bargaining unit and therefore not covered by the collective-bargaining agreement. Regarding the Respondent's defense as to discriminatee Samuel Gulino, the General Counsel contends that simply stating that Gulino "indicated to the building manager that he did not want hospitalization" is an inadequate defense because the parties' collective-bargaining agreement does not provide for a waiver of hospitalization. Moreover, the General Counsel argues that what an employee may or may not have said does not affect his entitlement to hospitalization or affect the Respondent's obligation to provide such hospitalization. Finally, the General Counsel contends that the Respondent's laches defense must fail because any delay in the proceedings is attributable to the Respondent, and, moreover, it is Board policy not to place the consequences of a delay "upon wronged employees."

We find that, except as to discriminatee Raymond Smitley and the payment of sick leave, the General Counsel is entitled to summary judgment.

With regard to the Respondent's assertion that it has no responsibilities under the expired collective-bargaining agreement, we find that this defense is *res judicata* because the issue has been determined in the previous contempt proceeding in the United States Court of Appeals for the Third Circuit.

With regard to the amounts due to each individual employee for holiday pay, vacation pay, wage differential, bereavement, and hospitalization, a general denial is inadequate to satisfy the pleading requirement set forth in Section 102.56 of the Board's Rules and Regulations because the answer does not specifically state the basis for the denial, including those details which relate to the amounts each employee should have received during each quarter of the backpay period, and the total of the amounts that each individual employee was entitled to, but failed to receive, as set forth in the collective-bargaining agreement. The Respondent's answer thus does not satisfy the Board's Rules. Accordingly, we find that the allegations of the specification concerning the amounts each employee should have received during each quarter of the backpay period but failed to receive as set forth in the parties' collective-bargaining agreement in the areas of holiday pay, va-

cation pay, wage differential, bereavement, and hospitalization as set forth in Appendices A through S have been admitted to be, and are, true.

The Respondent generally denies the paragraphs of the backpay specification dealing with the backpay periods, rate of pay, and gross backpay of each discriminatee. A general denial is inadequate to satisfy the pleading requirements as set forth in Section 102.56 of the Board's Rules and Regulations. These allegations are, therefore, deemed admitted to be, and are, true.

Under Section 102.24(b) of the Rules and Regulations, the Board may deny a Motion for Summary Judgment where it believes that a genuine issue of fact may exist. Regarding discriminatee Raymond Smitley and the payment of sick leave, we believe that genuine issues of fact may exist.

#### ORDER

IT IS ORDERED that the General Counsel's Motion for Summary Judgment is granted with respect to all employees except for Raymond Smitley.

IT IS FURTHER ORDERED that the General Counsel's Motion for Summary Judgment is granted with respect to the amounts set forth in the backpay specification and appendices regarding holiday pay, vacation pay, wage differential, bereavement, and hospitalization.

IT IS FURTHER ORDERED that this proceeding is remanded to the Regional Director for Region 6 for the purpose of arranging a hearing before an administrative law judge limited to the status of discriminatee Raymond Smitley and to whether sick leave benefits should be paid to all discriminatees.

IT IS FURTHER ORDERED that the administrative law judge shall prepare and serve on the parties a decision containing findings of facts, conclusions of law, and recommendations based on all the record evidence. Following service of the administrative law judge's decision on the parties, the provisions of Section 102.46 of the Board's Rules shall be applicable.